(2)

No. 91-844

In the Supreme Court of the United States

OCTOBER TERM, 1991

JOE HARRISON BENNETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government presented sufficient proof of venue.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is unreported, but the judgment is noted at 941 F.2d 1210 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1991. The petition for a writ of certiorari was filed on October 28, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). He was sentenced to six months' intermittent confinement, to be followed by a two-year term of supervised release. He was also ordered to pay a $2000 fine. Pet. App. B1-B2. The court of appeals affirmed. *Id.* at A1-A3.

1. Larry Warwick, a resident of Nashville, Tennessee, asked petitioner, a convicted felon, to take Warwick's firearms collection for safekeeping pending Warwick's divorce proceeding. After petitioner agreed, Warwick took the firearms to petitioner's house. Thereafter, Warwick told agents of the Bureau of Alcohol, Tobacco, and Firearms (BATF) in Nashville that petitioner had the firearms. Pursuant to a warrant, the agents searched petitioner's residence and seized the firearms. Pet. App. A1-A2; Gov't C.A. Br. 2-4.

2. During voir dire and again in closing argument, petitioner's trial counsel indicated that petitioner lived in Williamson County, which is in the Middle District of Tennessee. C.A. App. 15, 47, 48; see also 28 U.S.C. 123(b)(1). During the charge conference after both sides had rested, however, the district court expressed doubt about whether the government had shown at trial where petitioner's residence was located. C.A. App. 36. The government moved to reopen its case; petitioner moved for an acquittal for insufficient proof of venue. The district court denied both motions. *Id.* at 39-46. In its charge to the jury, the district court listed the counties that are in the Middle District of Tennessee and instructed the jury that the government had to prove beyond a reasonable

doubt that the offense with which petitioner was charged had occurred in that district. *Id.* at 49-50.

3. The court of appeals affirmed petitioner's conviction. Pet. App. A1-A3. The court held that petitioner had waived his venue challenge by failing to object prior to the close of the government's case. *Id.* at A3.

ARGUMENT

Petitioner renews his contention (Pet. 9-10, 16) that the government failed to prove venue. He also contends (Pet. 11-15) that the court of appeals' decision that he waived his challenge to venue conflicts with decisions of other courts of appeals. We acknowledge that other courts of appeals disagree with the Sixth Circuit on this issue. There is no need for this Court to resolve that conflict in this case, however, because the evidence was sufficient to show that venue was properly laid in the Middle District of Tennessee.

Article III, § 2, Cl. 3, and the Sixth Amendment of the Constitution require that a criminal trial be held in the State and District in which the offense occurred. See also Fed. R. Crim. P. 18. Venue, however, may be proved circumstantially, see, *e.g.*, *United States* v. *Leight*, 818 F.2d 1297, 1305 (7th Cir.), cert. denied, 484 U.S. 958 (1987); *United States* v. *McLean-Davis*, 795 F.2d 957, 958 (11th Cir. 1986), cert. denied, 479 U.S. 1060 (1987), and is sufficiently proved if it is established by a preponderance of the evidence, see, *e.g.*, *United States* v. *Lam Kwong-Wah*, 924 F.2d 298, 301 (D.C. Cir. 1991); *United States* v. *Bryan*, 896 F.2d 68, 72 (5th Cir.), cert. denied, 111 S. Ct. 76 (1990). On appeal, the evidence of venue must be viewed in the light most favorable to the government, and all reasonable inferences and credibility choices must be resolved in favor of the jury's verdict. *E.g.*, *United*

States v. *Burroughs*, 830 F.2d 1574, 1580 (11th Cir. 1987), cert. denied, 485 U.S. 969 (1988); *United States* v. *Rinke*, 778 F.2d 581, 584 (10th Cir. 1985).

Under those standards, the evidence at trial sufficed to show that petitioner's residence was located in the Middle District of Tennessee. All of the significant events occurred either in Davidson County—specifically, in Nashville—or in neighboring Williamson County, both of which are in the Middle District of Tennessee, 28 U.S.C. 123(b)(1). Warwick testified that, after petitioner agreed to keep the firearms at his residence, Warwick went "down there" to petitioner's house "in the country." C.A. App. 16-17. Williamson County borders the Nashville metropolitan area on the south, and the jury could reasonably have understood Warwick's statement that he went "down" to petitioner's house to mean that petitioner's house was located south of Nashville. Further, the documentary evidence showed that petitioner had been placed on probation in Williamson County. Gov't C.A. Br. 8. That fact implied that petitioner resided in or around Williamson County. In addition, the evidence showed that petitioner appeared for a deposition in a civil action at a law office in Williamson County two months after he received the firearms from Warwick, which indicated a further contact between petitioner and Williamson County. C.A. App. 21-23. The Middle District of Tennessee covers the entire portion of Tennessee, all the way to the Alabama-Mississippi border. See 28 U.S.C. 123(b)(1). Under those circumstances, and in light of the evidence linking petitioner to Williamson County, the jury could properly infer that petitioner's residence, which was "down there" and "in

the country," was within the Middle District of Tennessee.*

* The jury was instructed that it had to find that venue was proper beyond a reasonable doubt. C.A. App. 49. It is well settled, however, that venue need only be proved by a preponderance of the evidence. *E.g.*, *United States* v. *Gonzalez*, 922 F.2d 1044, 1054-1055 (2d Cir.), cert. denied, No. 91-5371 (Dec. 16, 1991); *United States* v. *Lam Kwong-Wah*, 924 F.2d at 301; *United States* v. *Smith*, 918 F.2d 1551, 1557 (11th Cir. 1990); *United States* v. *Bryan*, 896 F.2d at 72. The fact that the jury found venue with a higher degree of certainty than required warrants particular deference to that finding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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